In the Supreme Court

OF THE

United States

OCTOBER TERM, 1957

No. 23

On Appeal from the United States District Court
for the Northern District of California,
Southern Division

APPELLANT'S PETITION FOR REHEARING AND CLARIFICATION.

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No. 23

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR REHEARING AND CLARIFICATION.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Appellant files this its petition for rehearing and clarification respecting the decision of this Court rendered herein on March 3, 1958.

I.

THE FINDING BY THE LOWER COURT, UPON WHICH THIS COURT RELIED, THAT AN OFFICER OF THE UNITED STATES WHO NEGOTIATED WITH A CARRIER FOR REDUCED RATES WITHOUT PERMITTING THE PUBLIC UTILITIES COMMISSION TO DETERMINE THE REASONABLENESS OF SUCH REDUCED RATES COULD BE THROWN INTO THE COUNTY JAIL IS NOT SUPPORTED BY EVIDENCE AND IS CONTRARY TO THE PRIOR DECISION OF THIS COURT.

It is difficult to understand how this Court could seriously rely upon the provisions of Section 2112 of the Public Utilities Code or any other penal provision of that code to justify the invalidation of the 1955 amendment to Section 530 of said code. Apparently, this Court relied upon the finding of the lower court that an officer of the United States could be thrown into the county jail if he negotiated reduced rates with a carrier without securing the approval of the Commission. This finding of the lower court is based upon no evidence other than the language of Section 2112. There was not shown any threat, expressed or implied, that the responsible officer of the State of California would take any such action. The record is totally barren of any such threat. On the contrary, the responsible officer of the State of California stipulated that no such action would be taken. (pp. 4-7, Appellant's Reply Brief.) This case being an action in equity, the state of the record before this Court at the date of the argument is controlling. (*Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456, 466, 87 L. ed. 396, 402.)

Not only is the record barren of any threat, expressed or implied, of such action, the record shows a complete negation of any such action.

The undersigned Attorney for the Commission is charged with the duty of initiating penal action against any violator of the penal provisions of the Public Utilities Code. His authority derives from several sections of said code but principally from Section 307, thereof, which reads as follows:

> "The commission may appoint as attorney to the commission an attorney at law of this State, who shall hold office during the pleasure of the commission. The attorney shall represent and appear for the people of the State of California and the commission in all actions and proceedings involving any question under this part or under any order or act of the commission. If directed to do so by the commission, he shall intervene, if possible, in any action or proceeding in which any such question is involved. The attorney shall commence, prosecute, and expedite the final determination of all actions and proceedings directed or authorized by the commission; advise the commission and each commissioner, when so requested, in regard to all matters in connection with the powers and duties of the commission and the members thereof; and generally perform all duties and services as attorney to the commission which the commission may require of him."

Surely, such a stipulation by the responsible law enforcement officer of California, if accepted by this Court, would remove any fear, real or fancied, entertained by any officer of the United States that he would be subjecting himself to penal sanctions if he paid a lesser rate for transportation than the rate approved by the Commission.

Over and above the foregoing, the case law holds that, absent a specific statutory prohibition to that effect, the

mere purchase of an illicit commodity constitutes no crime, even though the purchaser knew it was illicit and the seller commits a crime in so selling the commodity. (*United States v. Farrar*, 281 U.S. 624, 634, 74 L. ed. 1078, 1081.) Unless there is shown some active conspiracy or aiding and abetting, there could be no crime. The mere purchase does not constitute either conspiracy or aiding and abetting.

With all due respect to the lower court, its finding that an officer of the United States could be thrown into the county jail for negotiating reduced rates with a carrier without the approval of the Commission is contrary to the law and the evidence and is a mere makeweight.

II.

RELIANCE BY THIS COURT UPON THE TESTIMONY OF OFFICERS OF THE ARMED FORCES, WHOLLY AT VARIANCE WITH THE VIEWS EXPRESSED BY THE SECRETARY OF DEFENSE, WAS UNJUSTIFIED.

There can be no doubt that this Court placed great reliance upon the testimony of these officers of the Armed Forces in arriving at its decision. In light of the contrary view expressed by their superior, the Secretary of Defense, in the Weeks' Report, this Court should have disregarded this testimony. (pp. 116-117, Appellant's Brief.) Surely, this Court was not entitled to disregard the contrary view of the responsible political head of the Department of Defense. Neither was this Court required to accept uncritically the testimony of these officers of the Armed Forces when human nature, necessarily, dictates

a bias on their part against any interference with what they believe to be desirable. *There is a military mind.*

The witness Lasher, whom this Court quoted, admitted that his view was contrary to that of the Secretary of Defense. (p. 117, Appellant's Brief and R. 426.) Lasher's view was merely echoed by the other Armed Forces witnesses.

We are reminded, in this regard, of an incident occurring at the Versailles Peace Conference following World War I. After prolonged debate by the delegates a particularly difficult question remained unresolved. A delegate, thereupon, inquired if the military had been consulted. Quickly, Lloyd George replied: "This is far too important a question to be decided by soldiers." We submit that this principle well could be applied here.

The Hoover Commission report clearly contradicts the testimony of these witnesses from the Armed Forces. (pp. 116-117, Appellant's Brief, and R. 422-429, 579, 580, 588-591, 606-612, 865-957.) Are we to accept the views of military men in preference to the considered judgment of the responsible civilian heads of the executive departments of the United States?

The claimed difficulties, obstacles and objections put forward by these officers of the Armed Forces are the ancient objections against any regulation at all. The history of regulation of transportation rates abounds with these same objections. They are commonplace and were put forward years ago without success. The only new objection is the one regarding security which could be and would be obviated by the complete exemption of traffic involving security.

At pages 5 and 6 of the dissenting opinion (pamphlet copy) there are pointed out sufficient answers to these manifold objections to the California statute which were advanced by the several witnesses from the Armed Forces. It is simply unrealistic to say that the State of California could not meet the objections raised by these witnesses, that is, within permissible constitutional limits. Those of us who have experienced many years of regulation and also who have served a number of years in the Armed Forces of the United States know that much of the testimony given by these witnesses from the Armed Forces is exaggerated beyond reality. (pp. 89-124, Appellant's Brief.)

Of course, claimed military necessity could have no possible application to the great mass of non-military traffic for the civilian agencies of the United States and similar traffic for the Armed Forces.

Would this Court have decided this case as it has had there been involved only non-military traffic for a civilian agency of the United States?

III.

THE DECISION IN THE INSTANT CASE, LAWFULLY, CANNOT BE RECONCILED WITH THE THREE STATE TAX DECISIONS DECIDED THE SAME DAY, AND PARTICULARLY CITY OF DETROIT v. MURRAY CORPORATION, 355 U.S. .....

We heartily agree with Mr. Justice Harlan and his colleagues in their dissent wherein they point out the inconsistency between the instant decision and the decision

in *City of Detroit v. Murray Corporation*, 355 U.S.....,
decided the same day.

It is unanswerable, as pointed out in the dissenting opinion, that there is no constitutional distinction between state regulation of the price of milk the United States must buy and the price which the United States must pay to ship the milk it has bought; neither, from an economic standpoint, could there be any distinction made between a can of milk and a hydrogen bomb.

The following quoted language from the prevailing opinion (pamphlet copy) in this case is, in our opinion, unreconcilable:

> ". . . *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. . . ." (p. 9.)

It will be noted that this Court stated in the *Penn Dairies* case that the Pennsylvania regulation did not impose a prohibition on the national government or its officers. However, in the instant decision this Court holds that the regulation of intrastate transportation rates by California places a prohibition on the Federal government and further states that the conflict between the federal policy of negotiated rates and the state policy of regulation of

negotiated rates "seems to us to be clear." If state regulation of the price of milk is valid against the Federal government and imposes no prohibition on that government or its officers, how can it be said that state regulation of the price of transportation services performed for the Federal government does exactly the opposite? *Where is the constitutional difference? Penn Dairies* is, impliedly, overruled. We are unable to see the applicability of the cases of *Arizona v. California, Leslie Miller v. Arkansas*, and *Johnson v. Maryland*, which are cited by this Court at page 9 of the prevailing opinion (pamphlet copy.)

Clearly, in this highly sensitive and delicate area of government the instant decision has overlooked that fundamental principle of indulging every lawful presumption in support of the constitutionality of a state statute.

We respectfully submit that if the same approach, which was used in the case of *City of Detroit v. Murray Corporation*, had been employed in the instant case, *the decision herein would have been in support of state authority.*

At page 3 of the prevailing opinion in the case of *City of Detroit v. Murray Corporation* (pamphlet copy), the following language appears:

> ". . . However in passing on the constitutionality of a state tax 'we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it.' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280. Consequently in determining whether these taxes violate the Government's constitutional immunity we must look through form and behind labels to sub-

stance. This is at least as true to uphold a state tax as to strike one down. . . ."

We wholeheartedly agree with the foregoing stated principle and approach in determining the constitutionality of a state statute. It is most respectfully contended that the foregoing stated principle was not applied in the decision involving the California statute here involved.

IV.

THE RULE REQUIRING EXHAUSTION OF THE ADMINISTRATIVE REMEDY WAS APPLICABLE TO THE INSTANT CASE.

Nothing said in the decision of this Court, in our opinion, justifies the disregarding by this Court of the rule of exhaustion of administrative remedies. What possible harm could ensue if such rule were followed? The status quo would be maintained and the state statute would be interpreted by those best qualified to interpret it, subject to final review by this Court. Is it asking too much to permit state authority to exhaust its jurisdiction where federal authority could not possibly be prejudiced by so doing?

We respectfully contend that the decision of this Court has roughly handled state authority and has taken action not at all in keeping with that spirit which underlies our dual system of government.

V.

APPARENTLY, THE INSTANT DECISION HOLDS THAT THE STATE STATUTE, HERE INVOLVED, IS UNCONSTITUTIONAL ON ITS FACE AND, ALSO, THAT THE SEVERAL ACTS OF THE CONGRESS REFERRED TO IN SAID DECISION INVALIDATE SAID STATUTE.

Appellant requests the Court to clarify its decision on the proposition advanced in the foregoing heading. Does the Court hold that the statute is unconstitutional on its face and, also, that the several acts of Congress, referred to in said decision, together with departmental regulations promulgated thereunder, invalidate said statute?

We contend that these Congressional acts and the regulations promulgated pursuant thereto are more consistent with the United States paying tariff rates than they are with a policy requiring the negotiation of rates. (pp. 9-29, Appendix B, Appellant's Brief.) But even conceding for the sake of argument a Congressional policy to *permit* Federal transportation officers to negotiate with carriers for rates more favorable to the Federal Government than established tariff rates would be, *nevertheless such would not be inconsistent with State regulation of such rates.* Private commercial shippers are continually negotiating with carriers in an effort to obtain for themselves rates more favorable than presently established rates. To be sure, the more favorable rates, if agreed upon, are subject to review by the appropriate regulatory body; but the existence and exercise of regulatory power have never foreclosed or impeded negotiation upon the subject of transportation rates.

Appellant respectfully suggests that one of the major fallacies of the majority opinion is its conclusion that the

claimed Federal policy permitting negotiation of rates is inimical to State regulation. At page 2 of the dissenting opinion (pamphlet copy) the fact is pointed out that the statutes and regulations relied upon by this Court as a manifestation of Congressional intent to displace state economic regulation are substantially the same as those found wanting in this respect in the *Penn Dairies* case, 318 U.S. 261. At page 275 of the U.S. Reports, this Court observed as follows with regard to the effect of these Congressional enactments and regulations promulgated pursuant thereto:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication [citing cases] should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

49 U.S.C. 65 clearly supports a Congressional policy of paying tariff rates. (p. 9, Appendix B, Appellants' Brief.) This is the policy expressed by the Congress of the United States. Surely, the policy established by the Congress of the United States should take precedence over any views expressed by officers of the Armed Forces.

In the footnote at page 8 of the prevailing opinion (pamphlet copy) this Court states that 49 U.S.C. 65, applies only to rates fixed by the Interstate Commerce Commission and is made expressly subject to Section 22 of the Interstate Commerce Act. This may well be true (except as applied to the last proviso of Section 65(a)) but it

does not negative in any way the fact that the Congress of the United States has therein expressed its policy to pay tariff rates for transportation of government property. What Section 65 seeks to do is to declare that there is no *prohibition* or policy against the paying by the United States of tariff rates. The reason that Section 22 is referred to in Section 65 is to make it clear that Section 22 has not been repealed by implication. Surely, the Congress would make no distinction between interstate and intrastate rates so far as a policy of paying tariff rates may be concerned. Land grant rates were not confined exclusively to interstate rates but applied to intrastate rates as well. Furthermore, the California statute, here concerned, applies to railroad freight rates as well as to truck rates and other common carrier freight rates, that is, as applied to intrastate commerce. The last proviso in Section 65(a) refers to all transportation services purchased by the United States and is not confined to carriers subject to the Interstate Commerce Act.

VI.

DOES THE DECISION OF THE COURT APPLY TO NON-MILITARY TRAFFIC FOR THE ARMED FORCES AND TO NON-MILITARY TRAFFIC FOR THE CIVILIAN AGENCIES OF THE UNITED STATES?

We agree with the view expressed in the dissenting opinion that the decision of the Court does extend to all government traffic. There is nothing in the decision which indicates the contrary. It is most important that regulatory officials throughout the United States be informed as to the scope of the decision here involved. Therefore,

we ask the Court to clarify this particular question. One of the reasons why the request is made is because great stress has been placed by this Court upon military necessity to support the judgment of the lower court; yet the decision would appear to extend to any and all traffic of the United States, military necessity to the contrary notwithstanding.

We assume that the decision makes no distinction between time of war and time of peace.

VII.

DOES THE DECISION OF THE COURT APPLY TO ALL OTHER REGULATED SERVICES SUCH AS TELEPHONE, TELEGRAPH, GAS, ELECTRIC, WATER AND WAREHOUSE SERVICES?

If the decision of this Court is to be applied to any and all transportation services purchased by the United States, it would be difficult to understand why it would not apply to all other regulated services such as telephone, telegraph, gas, electric, water and warehouse services. It is very important that regulatory officials be informed whether or not the instant decision covers the services enumerated. Therefore, we request this Court to clarify its decision in this regard.

VIII.

CONCLUSION.

By covering the points which we have covered in this petition for rehearing, we do not wish it understood that we have abandoned any of the propositions put forward by us in our brief and reply brief filed in this Court.

We reassert each and every proposition there advanced by us but confine our specification in this petition for rehearing to the foregoing points stated herein.

We are fully aware that the citation of the Tenth Amendment to the Federal Constitution is considered, now-a-days, as old-fashioned and unrealistic. With that view we strongly disagree. We believe that the Tenth Amendment is one of the firmest pillars supporting the edifice of constitutional government. That amendment is one of the reasons which justified Gladstone's statement that the Constitution of the United States is the most wonderful work ever struck off at a given time by the brain and purpose of man. It is most respectfully suggested that the spirit of the Tenth Amendment is absent from the instant decision. We plead for the infusion of that spirit.

Decisions such as the instant one, we respectfully contend, constitute mortal blows to the sovereignty of the several states and tend to degrade and dilute state authority in all departments of our governmental polity.

California pleads for constitutional tolerance and for that wise accommodation of the respective interests of the general government and the governments of the several states of which Jefferson and Madison so often spoke. We ask this Court to hearken unto the advice and wisdom of Thomas Jefferson and James Madison, and permit California the opportunity to demonstrate that it can administer this statute within the framework of the Federal Constitution.

Is it to be supposed that the Federal government believes that these carriers of freight, with whom it desires

to deal directly, will be more sensitive and alive to the interest of the Nation than would be the officers of the State of California; or, rather, is it not that the general government desires to deal directly with these carriers for the purpose of securing depressed rates by playing off one carrier against the other and thus engendering cutthroat competition, preference and prejudice, evils which regulation was principally designed to prevent? The record in this case abundantly shows that the officers of the United States have engaged in this type of conduct. (R. 870, 872, 894-900, 905-906; 933-934, 950-951, 956, 961-965, 969-970.)

Surely, it ought not to be feared that a contrary decision to the instant one would work irreparable harm when it is realized that the public servants of California are as patriotic and as alive to the interests of this Nation as are any of those who appeared for the United States in this litigation. Whereas, on the other hand, if this decision is allowed to stand state authority will be driven forever from the rate regulatory field where transactions with the United States are involved. As we read the all-embracing language of the decision of this Court, it holds all state regulation in that field unconstitutional by virtue of the Federal Constitution unaided by Congressional implementation.

We repeat here what this Court stated in the celebrated case of *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, that—

> ". . . the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government."

Also, we desire to remind this Court of its statement in *Penn Dairies, Inc. v. Milk Control Commission,* 318 U.S. 261, 275, 87 L. ed. 748, 756, that—

> ". . . we should be slow to strike down legislation which the state concededly had power to enact because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

WHEREFORE, Appellant prays that this Court grant a rehearing in this case and set aside its decision and take such action as will permit state authority to maintain its jurisdiction over the subject matter of the instant case.

Dated, San Francisco, California,
March 20, 1958.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, Everett C. McKeage, Attorney for the Public Utilities Commission of the State of California, Appellant herein, hereby certify that this petition for rehearing is presented in good faith and not for delay, being of the opinion that substantial questions of both law and fact are presented by said petition.

Dated, San Francisco, California,
March 20, 1958.

EVERETT C. MCKEAGE,
Chief Counsel,
Public Utilities Commission
of the State of California.